

Hilal (Migration) [2018] AATA 2451 (16 June 2018)

DECISION RECORD

DIVISION:	Migration & Refugee Division
APPLICANT:	Mr Allaf Hilal
CASE NUMBER:	1701050
DIBP REFERENCE(S):	BCC2015/1574295
MEMBER:	Russell Matheson
DATE:	16 June 2018
PLACE OF DECISION:	Sydney
DECISION:	The Tribunal remits the application for a Partner (Temporary) (Class UK) visa, with the direction that the applicant meets the following criteria for a Subclass 820 (Partner (Temporary)) visa: • cl.820.211(2) of Schedule 2 to the Regulations; and • cl.820.221(1)(a) of Schedule 2 to the Regulations.

Statement made on 16 June 2018 at 9:48am

1.

CATCHWORDS

Migration – Partner (Residence) (Class BS) – Subclass 820 (Partner (Temporary)) visa – Genuine relationship – Joint finances – Sponsor sole income earner – Bought property together – Limited documentary evidence in joint names – Commitment – Live together – Mutual understanding of each other's needs – Represent themselves as a couple to others – Decision under review remitted for reconsideration

LEGISLATION

2. *Migration Act 1958*, ss 5F, 65
Migration Regulations 1994, r 1.15A Schedule 2 cls 820.211, 820.221

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

3. This is an application for review of a decision of a delegate of the Minister for Immigration on 11 January 2017 to refuse to grant the applicant a Partner (Temporary) (Class UK) visa under s.65 of the *Migration Act 1958* (the Act).
4. The applicant is a 49 year old male national of Lebanon. He applied for the visa on 2 June 2015 on the basis of his relationship with his sponsor. At that time, Class UK contained only one subclass: Subclass 820 (Partner (Temporary)). The criteria for the grant of this visa are set out in Part 820 of Schedule 2 to the Migration Regulations 1994 (the Regulations). The primary criteria must be satisfied by at least one applicant. Other members of the family unit, if any, who are applicants for the visa need satisfy only the secondary criteria.
5. The delegate refused to grant the visa on the basis that the visa applicant did not satisfy cl.820.211 because the delegate was not satisfied the applicant is the spouse of the sponsor. The applicant seeks review of the delegate's decision.
6. The applicant appeared before the Tribunal on 13 June 2018 give evidence and present arguments. The Tribunal also received oral evidence from the sponsor and a witness Mr Eddie Amine, a friend of the parties. The Tribunal hearing was conducted with the assistance of an interpreter in the Arabic and English languages.
7. The applicant was represented in relation to the review by his registered migration agent.
8. For the following reasons, the Tribunal has concluded that the **matter should be remitted for reconsideration**.

CONSIDERATION OF CLAIMS AND EVIDENCE

9. The issue in the present case is whether the applicant is the spouse of the sponsor as defined in s.5F of the Act.
10. The Tribunal has before it the Department of immigration's file relating to the applicant; its own file; and a copy of the Department's decision provided by the applicant to the Tribunal.
11. The evidence the parties provided at the Tribunal hearing is recorded throughout this decision record.

Whether the parties are in a spousal or de facto relationship

12. Clauses 820.211(2)(a) and 820.221 require that at the time the visa application was made, and at the time of this decision, the applicant is the spouse or de facto partner of an Australian citizen or Australian permanent resident or an eligible New Zealand citizen. In the present case the applicant claims to be the spouse of the sponsor, who is an Australian citizen.
13. 'Spouse' is defined in s.5F of the Act and provides that a person is the spouse of another where the two persons are in a married relationship. Persons in a married relationship must be married to each other under a marriage that is valid for the purposes of the Act, there must be a mutual commitment to a shared life as a married couple to the exclusion of all others, the relationship must be genuine and continuing, and the couple must live together, or not live separately and apart on a permanent basis: s.5F(2)(a)-(d). In forming an opinion

about these matters, regard must be had to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the parties' household and their commitment to each other as set out in r.1.15A(3) of the Regulations, which is extracted in the attachment to this decision.

Are the parties validly married?

14. If the parties are validly married, they may meet the requirements of a spousal relationship, but not a de facto relationship. The applicant provided a copy of the parties' marriage certificate stating the marriage was solemnised in accordance with the *Marriage Act 1961* on 31 May 2015 at 9 Teneriffe Close, Epping, Victoria. There is no evidence before the Tribunal to indicate that the marriage is not valid. On the evidence, the parties were married to each other under a marriage that is valid for the purposes of the Act as required by s.5F(2)(a).
15. In forming an opinion whether they are in a marital relationship and in considering whether they have a mutual commitment to a shared life as husband and wife to the exclusion of all others, whether their relationship is genuine and continuing, and whether they live together and not separately and apart on a permanent basis as defined in s.5F(2)(b)-(d), the Tribunal has regard to all the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the applicant's and sponsors household and their commitment to each other as set out in r.1.15A(3).
16. After careful consideration of all of the evidence before it, the Tribunal has reached the conclusion that it is satisfied the applicant is the spouse of the sponsor within the meaning of s.5F of the Act. Below, the Tribunal sets out its consideration of the evidence under the relevant aspects of matters it must take into consideration under r.1.15A(3), and the reasons for its decision.
17. The Tribunal had the benefit of the applicant's and the sponsor's oral evidence at the hearing and found their evidence to be detailed, consistent and overall credible. The Tribunal gave all the evidence provided by the parties and witness at the Tribunal hearing and evidence provided by the applicant to the Department and Tribunal file due regard. The applicant provided a significant amount of additional documentary and photographic evidence to the Tribunal.
18. The Tribunal acknowledges the delegate's concerns set out in the primary decision record. The Tribunal discussed these with the applicant and the sponsor in the course of the hearing and the Tribunal is satisfied that the parties were credible witnesses.

Are the other requirements for a spousal relationship met?

19. *Financial aspects*

20. The Tribunal has considered the financial aspects of the relationship, including any joint ownership of real estate or major assets, any joint liabilities, the extent of any pooling or sharing of financial resources especially in relation to major financial commitments, whether any person in the relationship owes any legal obligation in respect of the other, and the basis of any sharing of daily household expenses.
21. The parties stated that they have a joint account and they have their own personal accounts. The sponsor stated that her wage is deposited in the parties' joint account to pay the bills and utilised for day-to-day living expenses. They further stated that the sponsor is the sole income earner and her income is deposited into the joint account. The sponsor said that the rent is deducted from her personal account because the lease for their rental property is in her name. The parties provided documentary evidence of money transfers between their

individual accounts and the joint account. The parties' evidence is that their individual accounts were established prior to entering in to their relationship and related to their personal circumstances at the time prior to consolidating their finances. The documents provide an indication to the Tribunal of preparedness to share each other's financial resources. The parties stated that they have purchased a block of land in Beveridge, Victoria for a cost of \$200,000 and their monthly payment for the land is \$1000. The applicant stated that he will be reopening his café business in Chapel Street, Melbourne and will soon earn an income from the business.

22. The parties had a sound knowledge and presented detailed and consistent evidence of their financial affairs including, income, rental payments, their joint account, the daily living expenses, household bills and employment.
23. The parties gave detailed and consistent evidence in relation to the financial aspects of the relationship. The parties' evidence is that they have joint liabilities in relation to property ownership and no other major assets. There is limited evidence before the Tribunal of pooling or sharing financial resources or any ongoing financial obligations. There is no evidence before the Tribunal that one person in the relationship owes any legal obligation in respect of the other. The Tribunal accepts that the parties are prepared to share their financial resources and any ongoing or future financial responsibilities. The Tribunal places some weight on this aspect of the relationship.

24. *Nature of the household*

25. The Tribunal has considered the nature of the household, including any joint responsibility for the care and support of children, if any, living arrangements and daily routine of the parties and the sharing of the responsibility for housework as to whether the parties are living together permanently in a partner relationship.
26. The parties stated that they have been living together since they were married in May 2015. They further stated that a number of unforeseen circumstances meant they had been separated from the beginning of 2017 and the applicant was living in Melbourne and the sponsor in Sydney. The applicant was involved in a serious motor vehicle accident in Melbourne and remained there for the treatment. The sponsor was offered a promotion at work and relocated to Sydney. The parties remained in constant communication and the applicant travelled between Melbourne and Sydney to visit the sponsor on a regular basis with the assistance of friends.
27. The parties gave detailed evidence in relation to their living arrangements in Melbourne and Sydney. They spoke of sharing the household duties and responsibilities and their times of separation when the applicant was living in Melbourne with his sister and the sponsor was living and working in Sydney. They provided consistent evidence of their living and rental arrangements and details about their daily activities and employment. The parties stated that there is limited documentary evidence in joint names because the sponsor is the sole income earner and is the only person able to obtain a lease agreement and utility bills in her name. The parties stated that they had purchased household items together such as a fridge and washing machine for their home. The parties provided limited photographic evidence of their co-habitation together in Sydney.
28. The Tribunal accepts the parties live together and that they have established a joint household. The Tribunal is satisfied that they share the household duties and responsibilities. The Tribunal places moderate weight on this aspect of the relationship because of the limited documentary evidence provided by the parties.

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30. Social aspects

31. The Tribunal considered the social aspects of the relationship, including whether the parties represent themselves to other people as being married to each other, the opinion of friends and acquaintances about the nature of the relationship, and any basis on which the parties plan and undertake social activities.
32. The Tribunal accepts that the relationship is socially recognised by the applicant's family and the couple's friends. The sponsor said that she has a strained relationship with her own family and does not speak to them. There are limited statements from third parties, including close family members of the applicant, who express their view that the relationship is a genuine one. The parties stated that they rarely go out socialising and are homebodies. They further stated that they occasionally go to the movies and dine out with friends. The parties said that they hope to travel to Lebanon to visit the applicant's family and children. The parties stated that their social activities have been limited due to the fact that at different times during their relationship they have been hospitalised. The couple presented photographic evidence of their wedding and limited social activities together. The parties stated that they have a small circle of friends that they socialise with.
33. The Tribunal is satisfied they plan and undertake some joint social activities and represent themselves to others as being in a genuine and continuing relationship. The Tribunal accepts that some family and limited friends accept that they are living in a genuine and continuing relationship. The Tribunal places some weight on this aspect of the relationship.

34. Commitment

35. The parties claim to have been in a short-term relationship prior to their marriage in May 2015. To date, the parties have been in a relationship exceeding three years. The Tribunal accepts on the evidence provided the parties are lawfully married. The parties state that they have lived together with periods of temporary separation due to unforeseen circumstances. They maintain that they have remained in regular contact and the applicant travelled to Sydney on a regular basis to be with the sponsor.
36. The parties stated that they love each other have a mutual understanding of each other's needs and that they care and support one another during times of illness. The sponsor stated that the applicant provided care, support and comforted her during and after major back surgery. The parties stated that they have supported each other during times of rehabilitation after surgery.
37. The applicant told the Tribunal that he had originally sold his aluminium windows and doors business in Lebanon to establish his café in Melbourne. The applicant told the Tribunal that he has refurbished his café in Melbourne and has made arrangements for his friend to manage the café in Melbourne so he can live full-time in Sydney with the sponsor.
38. The parties stated at they have purchased a block of land in Melbourne with a future view of building their own home and to be with the applicant's siblings and their families. The parties also stated that intended to travel to Lebanon to strengthen their relationship with the applicant's children who reside in Lebanon with their grandmother.
39. The Tribunal is satisfied the applicant and the sponsor provide each other a degree of companionship and emotional support that is commensurate with a couple being in a genuine and continuing relationship. The Tribunal is satisfied the couple view their relationship as a long term one.

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41. **Findings**

42. The Tribunal is satisfied, having regard to the totality of the circumstances and the evidence provided that the applicant and the sponsor have a mutual commitment to a shared life to the exclusion of all others. The Tribunal is satisfied their relationship is genuine and continuing. The Tribunal is satisfied they live together and not separately and apart on a permanent basis. Having considered all the evidence and circumstances of the relationship as detailed above, the Tribunal is satisfied the parties were in a spousal relationship at time of application.
43. The Tribunal is satisfied that the sponsor is not prohibited from being a sponsoring partner and continues to sponsor the applicant. The Tribunal is satisfied that the sponsor, at the time of the visa application and decision, was an Australian citizen who had turned 18.
44. On the basis of the above the Tribunal is satisfied that the requirements of s.5F(2) are met at the time the visa application was made and at the time of this decision.
45. Therefore the applicant meets cl.820.211(2) and cl.820.221(1)(a).
46. Given the findings above, the appropriate course is to remit the application for the visa to the Minister to consider the remaining criteria for a Subclass 820 visa.

47. **DECISION**

48. The Tribunal remits the application for a Partner (Temporary) (Class UK) visa, with the direction that the applicant meets the following criteria for a Subclass 820 (Partner (Temporary)) visa:
- cl.820.211(2) of Schedule 2 to the Regulations; and
 - cl.820.221(1)(a) of Schedule 2 to the Regulations.

Russell Matheson
Member

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ATTACHMENT - Extract from Migration Regulations 1994

1.15A Spouse

- (1) For subsection 5F (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5F (2) (a), (b), (c) and (d) of the Act exist.
- (2) If the Minister is considering an application for:
 - (a) a Partner (Migrant) (Class BC) visa; or
 - (b) a Partner (Provisional) (Class UF) visa; or
 - (c) a Partner (Residence) (Class BS) visa; or
 - (d) a Partner (Temporary) (Class UK) visa;

the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).

- (3) The matters for subregulation (2) are:
 - (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day to day household expenses; and
 - (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being married to each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).